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OF CUSTOM, TREATIES, SCHOLARS AND THE GAVEL: THE INFLUENCE OF THE INTERNATIONAL CRIMINAL TRIBUNALS ON THE ICRC CUSTOMARY LAW STUDY

Robert Cryer[‡]

INTRODUCTION

The revival of humanitarian law as a subject of study has been at least in part an outcropping of the work of the international criminal tribunals created in the 1990s. Therefore it is no surprise that the influence of those tribunals on international law has been commented upon considerably.¹ However, outside of scholarly speculations it has not been that easy to obtain clear evidence of how much influence those tribunals have had on customary law aside from their own decisions.² There are two ways in which the tribunals may have affected views of customary law, through their constituent treaties and their jurisprudence. Neither is free from complexity or controversy. The difficulty involved in attempting to perceive the manner in which judicial decisions influence, or become considered reflective of, custom has been commented upon by Sir Hersch Lauterpacht, who brought his usual sagacity to the subject, stating that '[t]he imperceptible process by which the judicial decision ceases to be an application of existing law and becomes a source of law for the future is almost a religious mystery into which it is unseemly to pry.'³ The relationship between treaties and custom has also been the subject of much discussion, upon which there is no shortage of dispute both at the general level and on particular rules.

[‡] School of Law, University of Nottingham. I am very grateful to all the participants in the roundtable for their contributions to the roundtable and the considerable assistance I have drawn from the papers presented and the discussion they engendered, which has considerably improved my understanding of the study. I would like, in addition, to thank Dieter Fleck, Sangeeta Shah and Nigel White for their comments on an earlier draft.

¹ See, e.g. Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 *American Journal of International Law* 78; Christopher Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia' (1998) 2 *Max Planck Yearbook of United Nations Law* 97; William Fenrick, 'The Development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1998) 3 *Journal of Armed Conflict Law* 197.

² Which, of course, might be expected to take a sanguine view of their earlier pronouncements. On the other hand, certain influences, such as that of the *Tadić* interlocutory appeal (*Prosecutor v Tadić* Decision on Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995) on the ICC Statute can be seen, see, e.g. Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: CUP, 2002) p.160.

³ Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958) p.21.

Against this background, the ICRC customary law study,⁴ which not only sets out the rules it thinks are customary, but seeks to show its ‘working out’ gives us an exceptional chance to evaluate how the international criminal tribunals and their practice have been seen by an independent international actor.⁵ Indeed, an actor which has been mandated by the Geneva Conventions to act as a guardian of humanitarian law.⁶ This opportunity is made even more enticing because the *Study* makes very heavy use of the work of the ICTY and the ICC Statute. A quick count of the reliance of the *Study* on the ICTY and ICC reveals that their statutes or case-law are referred to over 170 times prior to the sections dealing with implementation and enforcement of humanitarian law. Unsurprisingly, in those sections reliance on those tribunals’ foundational documents and practice is even more pronounced.⁷ It might be noted, however, that reliance on the ICTR Statute is less notable, and the Tokyo IMT almost non-existent.⁸ This replicates the secondary status to which those Tribunals have, unfortunately, been relegated.

The *Study* had been described as a photograph,⁹ but it can be seen in a different manner, namely as a great impressionist painting. From a broad view, in its general conception and in many ways, it is a masterpiece, but the closer the look taken into the way it approaches custom is, the less beautiful it can seem. However, it has to be said that although by looking too closely at individual aspects of the *Study*, its overall quality can be missed. But the point is that a close analysis is important if the study is to be the beginning of discussions about IHL,¹⁰ which given its caliber, and thorough research base, it deserves to be.

Given that the study has already had an impact on courts both international and national,¹¹ and been the subject of heavy, if not unpredictable, criticism from republicans in the US,¹² it

⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: CUP, 2005), [hereinafter *Study*].

⁵ The precise status of the study as an ICRC document is a little more complex than might be thought. Although it was mandated by the 26th Conference of the Red Cross and Crescent, contains the ICRC logo on the cover and is said by the ICRC President to be believed by the ICRC to be an accurate statement of the law (Jakob Kellenberger, ‘Foreword’ in the *Study* ix, p.xi) it is not a formal ICRC statement of views, and the ICRC states that it ‘respected the academic freedom both of the report’s authors and the experts consulted’ (*ibid.*). The Study (even if in preparation) is conspicuously absent from François Bugnion, ‘The International Committee of the Red Cross and the Development of International Humanitarian Law’ (2004-2005) 5 *Chicago Journal of International Law* 191.

⁶ See, e.g. 1949 Geneva Convention III Relative to Prisoners of War, 75 UNTS 135, Articles 3, 123, 125, 126. Protocol Additional to the Geneva Conventions of 12 August 1949, 1125 UNTS 3, Article 5(3).

⁷ On the ICTR and international law see Larissa J. van den Herik, *The International Criminal Tribunal for Rwanda and the Development of International Law* (The Hague: Brill, 2005).

⁸ The only notable use is in relation to command responsibility, see e.g. *Study*, Vol II, pp. 3768-3772

⁹ Jakob Kellenberger, ‘Foreword’ in the *Study* ix, p.xi., Yves Sandoz, ‘Foreword’ in the *Study*, xiv, p.xvii.

¹⁰ Sandoz, ‘Foreword’, in the *Study*, p.xvii.

¹¹ See *Prosecutor v Hažibasanović and Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, IT-01-47-AR73.3, 11 March 2005, paras 29-30,38,45-46 and domestically, *Adalah and others v GOC Central Command, IDF and others*, Israel Supreme Court, 23 June 2005, HCJ, 3799, 02, paras 20, 21, 24. Theodor Meron avers that the *Study* ‘will be a significant aid to international criminal tribunals’, Theodor Meron, ‘Revival of Customary Humanitarian Law’ (2005) 99 *American Journal of International Law* 817, p.833.

is important, even for those sympathetic to the study,¹³ to appraise the study as objectively as possible, even though the aims of the study are unquestionably meritorious. In order to do this, it is necessary to begin by setting the international legal scene, of the general approach to treaties, judicial decisions and customary law in international law. Owing to some of the comments which will be offered later, it is also necessary to engage in a short excursus on the role of academics in international law.

TREATIES AND CUSTOM

With the possible exception of the Tokyo IMT, the statutes of international criminal tribunals all find their basis in treaty law.¹⁴ The London Charter of the Nuremberg IMT was a treaty.¹⁵ The Statutes of the ICTY and ICTR, although promulgated by the Security Council, find their legal basis in Chapter VII and Article 25 of the UN Charter.¹⁶ Although the Statutes are not, in themselves, treaties, they are sufficiently analogous to them (and have been treated as such by the Tribunals)¹⁷ that for the purposes of this article they may be considered under that rubric. The Rome Statute is a multilateral treaty, and the legal basis of the Special Court for Sierra Leone is a treaty between the UN and Sierra Leone.¹⁸ Therefore it is apposite to digress for a moment into the relationship between treaties and custom.¹⁹

¹² On which see Iain Scobbie, 'The Approach of the Study to Customary Law??' (2006) 11 *Journal of Conflict and Security Law* ??, pp.??; see also Malcolm Maclaren and Felix Schwendimann, 'An Exercise in the Development of International Law: The New ICRC Study on Customary International Law' (2005) 6 *German Law Journal*, 1217, pp.1237-1238. There has also been criticism from members of the US forces, see, e.g. W. Hays Parks, 'The ICRC Customary Study: A Preliminary Assessment' (2005) 999 *Proceedings of the American Society of International Law* 208.

¹³ Of which I consider myself to be one. Lest there be any misinterpretation of this piece, the compliments herein directed to the *Study* are not sops to professional courtesy, but a reflection of genuine admiration for the study, and the criticisms ought to be read against the background of my support for most of what the *Study* says, and its intentions in full.

¹⁴ Even in the case of the Tokyo IMT, its basis is probably treaty law, i.e. the instrument of surrender between Japan and the Allies.

¹⁵ 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 82 UNTS 279.

¹⁶ *Prosecutor v Tadić*, *supra* n.2, paras 28-40.

¹⁷ See, e.g. William A. Schabas, 'Interpreting the Statutes of the ad hoc Tribunals' in Lal Chand Vohrah *et al* (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer, 2003) 847, pp.849-870.

¹⁸ 2001 Agreement Between the United Nations and Sierra Leone on the Establishment of a Special Court. This article treats the Special Court as an international tribunal solely on the basis that the *Study* does. In spite of its protestations to the contrary, (see, e.g. *Prosecutor v Taylor*, Decision on Immunity, SCSL-2003-01-I, 31 May 2004, paras 37-42) the Special Court is a hybrid tribunal. For criticism of the Special Court's views see Zsuzsanna Deen-Racsmány, 'Prosecutor v Taylor: The Status of the Special Court for Sierra Leone and Its Implications for Immunity' (2005) 18 *Leiden Journal of International Law* 299.

¹⁹ Probably the classic work in the area is Richard R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965-1966) 41 *British Yearbook of International Law* 275. A more modern, and very useful study is Mark Villiger, *Treaties and Custom: A Manual on the Theory and Practice of the Interrelationship of Sources* (The Hague: Kluwer, 2nd ed., 1997). See also Michael Byers, *Custom: Power and the Power of Rules: International Relation and Customary International Law* (Cambridge: CUP, 1999) pp.166-180; Jonathan I. Charney, 'International Agreements and the Development of Customary International Law' (1986) 61 *Washington Law Review* 971. For a critical view of scholarship on the relationship between treaties and custom see Arthur M. Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 *Vanderbilt Journal of Transnational Law* 1.

Treaties and custom have what has accurately been described as an ‘entangled’ relationship.²⁰ The three ways in which treaties may interplay with customary law are, as is well known, summed up in the *North Sea Continental Shelf* Case.²¹ They are either that the treaty is drafted to reflect customary law at the time of its adoption, that the negotiating process crystallizes the customary rule, or that a treaty provision subsequently becomes accepted as reflecting custom.²² The difficulty, of course, is not stating the general propositions in this manner, but in determining in when each applies, or if any apply at all.

Certain matters are tolerably clear however. One is that, as the ILC committee on the formation of customary law noted, there is no presumption that a treaty is reflective of customary international law at the time of its conclusion.²³ There has been some support for the proposition that humanitarian law treaties are an exception to this.²⁴ When Richard Baxter, who is often cited as the *fons et origo* of this idea, canvassed the possibility it was only as a matter of *lex ferenda*.²⁵ Nonetheless, there is some evidence that in relation to humanitarian law the standards of proof in relation to customary law have been relaxed when compared to other areas of law, particularly by tribunals dealing with the matter.²⁶

Even so, care must be taken with this argument, as a tendency to adopt the view that humanitarian law is customary without adequate proof is unlikely to convince skeptics of the accuracy of the result. There is no rule of international law that provides for a special status for humanitarian law in relation to the formation of customary law and it is a matter of evidence in any individual case whether or not a treaty rule represents the custom one.²⁷

In relation to this, there are a number of factors that have a bearing on proof of the customary status of a treaty rule. The first of these is the extent to which the treaty was considered codificatory at the time of its creation. One piece of evidence that this is the case is the treaty itself stating that it is intended to be codificatory of pre-existing custom.²⁸ This is only evidence though; the statement itself may be incorrect (although the more States that ratify the treaty, the more States are estopped from denying the accuracy of the assertion).²⁹

²⁰ Oscar Schachter, ‘Entangled Treaty and Custom’ in Yoram Dinstein (ed.), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff, 1989) 717.

²¹ (1969) ICJ Reports 3.

²² *Ibid.*, paras 60-82. See also International Law Association, *Report of the Committee on Formation of Customary (General) International Law* 1, pp.42-54.

²³ *Ibid.*, p.43.

²⁴ Baxter, *supra* n.19, pp.286, 299.

²⁵ *Ibid.*, This is something misunderstood by Weisburd, *supra* n.19, pp.39-41.

²⁶ See, e.g. Frederick Kirgis, ‘Custom on a Sliding Scale’ (1987) 81 *American Journal of International Law* 146, pp.147-150; Theodor Meron, *Human Rights and Humanitarian Law as Customary Law* (Oxford: OUP 1989). See also Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *American Journal of International Law* 757, pp.764-766, 772-774.

²⁷ See e.g. Michael Akehurst, ‘Custom as A Source of international Law’ (1976) 47 *British Yearbook of International Law* 1, pp.45-48. As the *Study* notes, p.xliii, see Maclaren and Schwendimann, ‘Exercise’, *supra* n.12, p.1123.

²⁸ See, e.g. ILC Report, *supra* n.22, p.44; Villiger, *supra* n.18, pp.232-236.

²⁹ Baxter, ‘Multilateral Treaties’ *supra* n.19, pp.277-278. Equally, the fact that preambles are not binding has a bearing on the question in situations where the statement of a treaty’s codificatory nature is made there, (Villiger, *ibid.*, p.236). And that is where the majority of such statements are made.

Care must be taken where the treaty ‘suggest[s] that some (unidentified) conventional rules may be codificatory. These formulations, while in fact providing little enlightenment, at least rule out a presumption that the instrument as a whole constitutes progressive development’.³⁰ The next evidence relevant to determining customary status is the *travaux préparatoires* of the treaty. These may show that the intention of the parties was to codify customary international law in a particular provision, or perhaps even more generally.³¹ This includes ILC Reports where they are relevant. The *travaux* can also provide evidence that a rule crystallized as customary at a conference.

In relation to a treaty rule which is progressive development of the law at the time of its promulgation, a later finding that it has become customary is perfectly possible.³² However, this is not something which is ‘lightly to have been regarded as having been attained’.³³ Nevertheless, this has certainly occurred, and some of the most notable examples have been in humanitarian law.³⁴ As with questions of whether a treaty rule is codificatory or if custom crystallised at a drafting conference (or before), questions of evidence are important here.

This should not be a surprise: The question whether a treaty rule has become reflective of customary law is a question of the presence or otherwise of State practice and *opinio juris*, in the same way as applies to the question of if any purported rule is one of customary law.³⁵ In some ways, it can be more difficult to appraise practice in relation to a norm which has a pre-existing treaty basis, as the practice of parties to the treaties *inter se* can be attributed to the existence of the treaty.³⁶ As a result, the practice of State parties to a treaty in relation to third-parties, and their response to that practice is very relevant in determining the customary status of a novel treaty rule. The statements of non-parties as to their views on the customary status of rules can also be very useful here. The existence of a treaty has, in the past, led States to set out their position as to whether or not the rules it contains are an accurate reflection of the custom. In humanitarian law, US views on Additional Protocol I are of particular note.³⁷

Turning back to later evidence, one frequently resorted to piece of evidence is the number of States that have ratified the relevant treaty. In some ways this is paradoxical, given that the greater the number of parties, the more practice can be referred to the treaty.³⁸ Similarly, the greater the claim of a treaty to customary status at the time of its adoption, the lesser the impetus for States to bother to ratify the convention, as it will not alter their obligations.³⁹ Still, a very widely ratified treaty has a considerable ‘pull’ towards acceptance, as there is a

³⁰ Villiger, *Customary Law*, *ibid.*, p.232.

³¹ See Villiger, *Customary Law*, *ibid.*, pp.231-232.

³² ILA Report, *supra* n.22, pp.50-54, Villiger, *Customary Law*, *ibid.*, Chapter 6.

³³ *North Sea Continental Shelf* Case, *supra* n.21, para 71.

³⁴ ILA Report, *supra* n.22, p.46. The fact that the major rules of humanitarian law are of a fundamentally norm-creating manner is not irrelevant here.

³⁵ Villiger, *Customary Law*, *supra* n.19, pp.182-183.

³⁶ ILA Report, *supra* n.22, pp.46-47.

³⁷ See, for example, Christopher Greenwood, ‘The Customary Status of the 1977 Geneva Protocols’ in Astrid J.M. Delissen and Gerard J. Tanja, *The Humanitarian Law of Armed Conflict: Challenges Ahead* (Dordrecht: Martinus Nijhoff, 1991) 93.

³⁸ See Baxter, ‘Multilateral Treaties’ *supra* n.19, pp.282-283.

³⁹ *Ibid.*, pp.285-286.

feeling that if a treaty is very broadly ratified, it represents the general expectations of those States.⁴⁰ That certainly appears to be the approach taken by international tribunals.

JUDICIAL DECISIONS AS A SOURCE OF INTERNATIONAL LAW

As with the relationship between treaties and customary law, the status of judicial decisions as a source of law is a matter upon which the level of literature is particularly high.⁴¹ Although judicial decisions are only mentioned as a subsidiary means for determining the law in Article 38(1)(d) of the ICJ Statute this understates the practical effect that judicial decisions have on the ascertainment, in particular, of customary international law. It is almost certainly trite now (although it may not have been in 1979) to note, as Igor Blishchenko did, that ‘international humanitarian law owes a great deal to decisions handed down by national and international courts.’⁴² The concrete form of a judgment, alongside the fact that it is (or at least should be) attended by a reasoned opinion gives a judicial decision considerable weight in international law.⁴³ A quick perusal of the commentaries to the ILC Rules on State Responsibility shows that in practice this is the case.⁴⁴ One of the most accurate statements of the status of judicial decisions in international law comes from Oppenheim:

In the absence of anything approaching judicial precedent the common law doctrine of judicial precedent, decisions of international tribunals are not a direct source of law in international adjudications. In fact, however, they exercise considerable influence as an impartial and considered statement of the law by jurists of authority made in light of actual problems which arise before them...it is probable in view of the difficulties surrounding the codification of international law, international tribunals will in the future fulfill, inconspicuously but efficiently, a large part of the task of developing international law⁴⁵

⁴⁰ Such a process appears to have occurred with respect to at least most of the 1949 Geneva Conventions.

⁴¹ The literature is so strong that it is to be hoped that readers will forgive the rather heavy use of quotation in this section. For some of the best examples amongst this literature see, in particular, Lauterpacht, *Development, supra* n.3; Mohammed Shahabuddeen, *Precedent in the World Court* (Cambridge: CUP, 1995); Robert Y. Jennings, ‘The Judiciary, National and International, and the Development of International Law’ (1996) 45 *International and Comparative Law Quarterly* 1; Georg Schwarzenberger, *International Law as Applied By International Courts and Tribunals: Vol 1* (London: Stevens, 3rd ed., 1957).

⁴² Igor P. Blishchenko, ‘Judicial Decisions as a Source of International Humanitarian Law’ in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Napoli: Editoriale Scientifica, 1979) 41, p.51. For a modern (and non-trite) appraisal see Guénaél Mettraux, *International Crimes and the ad Hoc Tribunals* (Oxford: OUP, 2005) pp13-18.

⁴³ Sir Gerald Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’ (1958) *Symbolae Verzijl* 153, p.172; Ian Brownlie, *The Rule of Law in International Affairs: International Law at the 50th Anniversary of the United Nations* (The Hague, Kluwer, 1998) p.28. See also *infra* ??

⁴⁴ See James Crawford, *The International Law Commission’s Articles on State Responsibility: Texts and Commentaries* (Cambridge: CUP, 2002).

⁴⁵ Robert. Y. Jennings and Arthur Watts (eds.), *Oppenheim’s International Law: Volume I: Peace* (London: Longman’s, 9th ed., 1992) p.41. The only caveat that may be entered is about the inconspicuous nature of some of some of the development of international law by some courts.

As Mohammed Shahabuddeen has noted,⁴⁶ despite the fact that a court decision cannot create law *per se*, by recognising the existence of a rule of customary international law a court decision may essentially act as the final stage of the crystallization of that customary rule.⁴⁷ As Sir Robert Jennings has explained though, there are limits to the role that international tribunals may take owing to their nature as law determining, rather than creating, agencies:

[J]udges, whether national or international, are not empowered to make new laws. Of course we all know that interpretation does, and indeed should, have a creative element in adapting rules to new situations and needs, and therefore also in developing it even to an extent that might be regarded as changing it. Nevertheless, the principle that judges are not empowered to make new law is a basic principle of the process of adjudication. Any modification and development must be seen to be within the parameters of permissible interpretation. For otherwise judges lose their ultimate source of authority. Litigating parties do not resort to judges because they are wise or statesmenlike—very often they are manifestly neither—but because they know the law.⁴⁸

Similarly, the two bitter interlocutors of the first half of the twentieth century in British academic international law, Sir Hersch Lauterpacht and Georg Schwarzenberger, despite their considerably differing methods, agreed on certain things. One of these was that the decisions of international tribunals were useful evidence of what customary law was, but, and this is a large caveat, this depended on the quality of the decision. Hence Lauterpacht, in *The Development of International Law by the International Court* said:

the outcome of the general recognition of the persuasive force of judicial precedent has been the development of a comprehensive body of law which, *in proportion to its intrinsic method*, can be used not only as direct evidence of specific rules of law as understood by the court, but also as indicative of the method and the spirit in which the Court may be counted upon to approach similar cases [emphasis added].⁴⁹

Schwarzenberger, on the other hand graded court decisions as evidence of international law on the basis of the extent to which the court was impartial, free from personal interest of the judges, had an international outlook and had high technical standards. Even within those courts which, like the ICJ, fulfilled the general criteria, Schwarzenberger believed in looking carefully at the standard of reasoning in cases.⁵⁰ As he said, 'it is probably not accidental that the least convincing statements on international law made by the International Court of Justice excel by a remarkable economy of argument'.⁵¹

⁴⁶ Shahabuddeen, *Precedent*, *supra* n.41, p.72.

⁴⁷ It might be noted parenthetically that, in the context of State Responsibility, States have expressly used this possibility to argue against any quick attempt to adopt the ILC rules into a treaty see James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 *International and Comparative Law Quarterly* 959, pp.960, 966-968.

⁴⁸ Jennings, 'Judiciary', *supra* n.41, p.3. Sir Gerald Fitzmaurice, 'Judicial Innovation—Its Uses and Its Perils' in R.Y. Jennings (ed.), *Cambridge Essays in International Law in Honour of Lord McNair* (London: Stevens, 1965) 24.

⁴⁹ Lauterpacht, *Development*, *supra* n.3, p.18.

⁵⁰ Schwarzenberger, *International Law*, *supra* n.41, p.30.

⁵¹ *Ibid.*, p.32. See also Mettraux, *International Crimes*, *supra* n.42, p.15. It might be noted that the ICTY has, on at least one occasion refused to follow an earlier decision of the ICTR it considered badly reasoned, see *Prosecutor v Vasiljević*, Judgment, IT-98-32-T, 29 November 2002, footnote 586.

Another word of caution also ought to be mentioned. Where a decision is quoted as evidence of customary law, care must be taken not to ‘double-count’ the practice in the decision and the decision itself. Cases are useful repositories of practice, and the views taken on them by international judges are entitled to respect. However, the two are, and ought to be separable.

As an aside, it ought to be noted at this point that the proof of evidence of customary international law is not apolitical. A heavy reliance on the jurisprudence of international tribunals can be seen as a deliberate counter-hegemonic strategy.⁵² Ian Brownlie rightly made this clear in his 1995 Hague Academy Course on General International Law ‘[t]he hegemonial approach will necessarily favour the decisions of the Security Council, especially in the constellation of world politics. It will not tend to favour institutions like the International Court, which cannot be controlled by a small group of States’.⁵³ The relevance here of Iain Scobbie’s comments hardly needs to be made express.⁵⁴

ACADEMICS AND THE DETERMINATION OF CUSTOMARY INTERNATIONAL LAW

Although the focus of this piece is not the influence of academics on international law *per se*, owing to their practical importance in determining the relevant impact of treaties and judicial decisions on customary law it is worth mentioning their role. Academics frequently write on the question of whether a treaty provision is customary or not⁵⁵ and criticise the decisions of courts, particularly in relation to their assertions about customary law.⁵⁶ It is to say the least, unduly self-denying to fail to take account of such work, in particular when engaging in a task such as the *Study*’s, which is to appraise the nature of customary law across such a broad spectrum of rules as humanitarian law encompasses.

⁵² On hegemony and international law generally see Detlev Vagts, ‘Hegemonic International Law’ (2001) 95 *American Journal of International Law* 843 and José E. Alvarez, ‘Hegemonic International Law Revisited’ (2003) 97 *American Journal of International Law* 873.

⁵³ Brownlie, *Rule of Law*, *supra* n.43, p.33.

⁵⁴ Scobbie, *supra* n.12, pp.?? Although José Alvarez has expressed doubt at the extent to which the *ad hoc* tribunals’ decisions can be independent of their creators. See José E. Alvarez, ‘Crimes of Hate/Crimes of State: Lessons From Rwanda’ (1999) 23 *Yale Journal of International Law* 365, p.398. Alvarez provides no empirical evidence of this at the judicial stage, however, and the extent to which China and Russia welcomed the decisions on the law applicable to non-international armed conflicts and crimes against humanity, *inter alia*, in *Prosecutor v Tadić*, *supra* n.2, paras 96-136 and *Prosecutor v Tadić*, Judgment, IT-94-1-T, 7 May 1997, para 627 might be queried. Mark Osiel views the ICTY’s development of joint criminal enterprise liability as proof of their independence from the US, see, Mark J. Osiel, ‘Modes of Participation in Mass Atrocity’ (2005) 39 *Cornell International Law Journal* 793, pp.800-802. Martti Koskenniemi, in stating that the 1999 *Tadić* appeal (*Prosecutor v Tadić*, Judgment, IT-94-1-A, 15 July 1999) demonstrated a ‘bias to guarantee as wide a scope for international prosecutions as possible’ at least implicitly takes the view that the judges of the ICTY have minds of their own, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: CUP, reissue, 2006) pp.586.

⁵⁵ See, e.g. Antonio Cassese, *International Criminal Law* (Oxford: OUP, 2003) pp.91-94.

⁵⁶ See, e.g. the papers in the ‘Agora: The ICJ Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory’ (2005) 99 *American Journal of International Law* 1-141.

Normally, the role of scholars in international law is at best a default one.⁵⁷ Article 38(1)(d) of the ICJ Statute treats the outpourings of the most highly qualified publicists as being a subsidiary means of determining the law. There are those who further subordinate the views of scholars to the other subsidiary means of determining the law, judicial decisions.⁵⁸ This is probably accurate, at least in relation to the extent to which a particular statement of law may be taken as authoritative. As Fitzmaurice made clear, the form of a decision and the attitude of parties to international litigation to decisions of tribunals make them of greater weight than the writings of jurists. Equally, judicial decisions often cite or rely on (*sub silentio* or otherwise) the views of academics. As it happens, this has particularly been the case in relation to humanitarian law through the international criminal tribunals.⁵⁹

Scholars have frequently engaged in detailed studies of customary law, and in doing so, provided evidence of how evidence of custom may be appraised, alongside critiquing claims of customary status by others.⁶⁰ Like case-law, in proportion to their technical standards, such studies are of use in assisting in the determination of custom, and indeed the *Study* itself, and its judicial reception, is evidence of this utility.⁶¹

The vast majority of the literature in relation to the impact of scholars on international law deals with the possibility that it has a constructive function, i.e. that scholars will attempt to push the law forward to a position which they consider appropriate.⁶² The constructive effect of scholarship can only be half of the story. As the extent to which a judicial decision's view on what amounts to custom may be considered acceptable relies (*inter alia*) upon the quality of the reasoning of that decision, critiques of that reasoning are particularly important. Academic demolitions of the reasoning and results in cases can have a

⁵⁷ The classic statement of the role of academics in international law is Clive Parry, *The Sources and Evidences of International Law* (Manchester: Manchester UP, 1968) pp.103-108.

⁵⁸ See, for example, Fitzmaurice, 'Some Problems' *supra* n.43, pp.174-175.

⁵⁹ See, e.g. *Prosecutor v Krstić*, Judgment, IT-98-33-A, 19 April 2004, paras 10, 25; *Prosecutor v Stakić*, Judgment, IT-97-24-T, 31 July 2003 para 519. The famous *Tadić* interlocutory appeal was clearly influenced by Theodor Meron's work. See, for example, Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554. Meron was a consultant to the prosecutor in the *Tadić* litigation.

⁶⁰ Perhaps most notable in this regard is Theodor Meron, *Human Rights*, *supra* n.25.

⁶¹ Not least, by collecting instances practice together, which States, Courts and advocates may not have the ability or time to do. Scholarly studies have, since at least Vattel's, *Principles of the Law of Nations* (New York, Carnegie Endowment for International Peace, 1916 (originally 1758)) proved highly influential, and not just amongst scholars, see (from very different perspectives) see B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Delhi: Sage, 1993) pp.229-230; Jeremy Rabkin, *Law Without Nations: Why Constitutional Government Requires Sovereign States* (Princeton, Princeton UP, 2005) pp.78-81; Koskenniemi, *supra* n.54, p.112.

⁶² See e.g. Sir Robert Jennings, 'International Lawyers and the Progressive Development of International Law' in Jerzy Makarczyk, *Theory of International Law at the Threshold of the 21st Century: Essays In Honour of Krzysztof Skubiszewski* (The Hague: Kluwer, 1996) 413.

considerable effect on the reception of such decisions. The critical savaging that has attended some of the findings in the *Yerodia* case is a case in point.⁶³

THE APPROACH OF THE STUDY TO THE TRIBUNALS

Bearing in mind the above, it is time (finally) to move on to the approach the study proclaims itself to take to the international tribunals, through their treaties and jurisprudence. The first port of call on this is the introduction to the *Study* which, quite rightly, seeks to explain its methodology. In relation to the impact of treaties on custom, the study gives a fairly brief explanation of the interrelationship of treaties and custom, with a rather heavy emphasis on the number of parties to treaties⁶⁴ (assumedly owing to the controversial nature of parts of Additional Protocol I).⁶⁵ Even though, as we will see, the study relies quite heavily at times on the Statutes of the ICTY and ICC in particular, the only time the study expressly deals with the normative impact of the Statutes of international criminal tribunals is in relation to the Rome Statute. Thus we are not told of the relevant normative value of the other Tribunals' Statutes at all. Given the extent to which they are relied upon, this is unfortunate, and indicative of one of the problems with the study- it is often silent on the weight given to particular evidences of custom, a point to which we will return.

As it happens, the ICTY Statute, owing to the intention of its drafters, is very good evidence of customary law. This is because the Secretary-General's Report on the ICTY, which is analogous to the *travaux préparatoires* of a treaty, makes clear that the intention in drafting the Statute was to stay within the bounds of customary law: 'the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence to some but not all States to specific conventions does not arise'.⁶⁶

The same is not necessarily the case in relation to the Rwanda Tribunal. The Secretary-General was not involved in the drafting of the ICTR's statute,⁶⁷ and there are no analogues to *travaux* for it. The Secretary-General did report on the Statute, however, and gave some remarks which are relevant to the appraisal of its customary status. Commenting on the war

⁶³ *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium) ICJ General List 121, 14 February 2002. For a selection of the critical literature see Antonio Cassese, 'When May Senior State Officials Be Prosecuted for International Crimes: Some comments on the Congo v Belgium Case' (2002) 13 *European Journal of International Law* 853; Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v Belgium Case' (2002) 13 *European Journal of International Law* 877; Neil Boister, 'The ICJ in the *Belgian Arrest Warrant* Case: Arresting the Development of International Criminal Law' (2002) 7 *Journal of Conflict and Security Law* 293; Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Justice* 735.

⁶⁴ *Study*, pp.xlii-xliv.

⁶⁵ The *Study* itself notes this. See the critical remarks of Daniel Bethlehem, *The Law of Armed Conflict: Problems and Prospects: Chatham House, April 18-19 2005: Transcripts and Summaries*, 9, p.12.

⁶⁶ Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para 34.

⁶⁷ Daphna Shrager and Ralph Zacklin, 'The International Criminal Tribunal for Rwanda' (1996) 7 *European Journal of International Law* 501, p.504.

crimes provisions in the Statute, the Secretary-General noted that by including Additional Protocol II in the jurisdiction of the ICTR, the drafters of the Statute (the US and New Zealand), had gone beyond customary law.⁶⁸ The *Study*, despite relying on the ICTR Statute,⁶⁹ at no point discusses this. This is not to say that its reliance on the Statute is necessarily wrong, but it is not sufficiently explained.

Finally, in relation to the Special Court for Sierra Leone, the Secretary-General, who drafted the Statute of the Special Court (in negotiation with the Sierra Leonean government), clearly saw his mandate as limited to customary international law. As he said, again,

In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.⁷⁰

This had specific effects. In his initial draft of the Statute, the Secretary-General included a very limited prohibition of the recruitment of child soldiers, on the basis that he was not convinced that the provision in the Rome Statute could have been considered customary in 1996.⁷¹ Interestingly, the Security Council insisted that the Secretary-General replace his suggested provision with one which conformed to that in the Rome Statute,⁷² ‘to conform it to the statement of the law existing in 1996 and currently accepted by the international community’.⁷³ It is very surprising that this is not mentioned by the study, particularly when it relies on the Statute of the Special Court as part of the evidence to establish that the conscription or enlistment of child soldiers has been prohibited by customary law.⁷⁴

To return to what the study actually says about the statutes of international criminal tribunals, the study limits itself to the statement that ‘it is important to stress, though it is not repeated in the commentaries, that with regard to the Statute of the International Criminal Court, there was a ‘general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not create new law’.⁷⁵

There are a number of points that need to be made in relation to this, which implies that the *Study* takes a rather broad-brush approach in its reliance on the Rome Statute. The statement is one about the intentions of the drafters at Rome, it does not say that the results of the conference lived up to this hope. It must be remembered that the Rome Statute was a product of compromise. The Rome Statute itself deals with the possibility that its definitions

⁶⁸ *Report of the Secretary General Pursuant to Paragraph 5 of Security Council Resolution 955*. UN Doc. S/1995/134, para 12.

⁶⁹ See, e.g. *Study*, pp. 10, 183, 311, 315, 320, 321, 324, 328, 334.

⁷⁰ *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, 4 October 2000, UN Doc S/2000/915, para 12.

⁷¹ *Ibid.*, paras 17-18.

⁷² Statute of the International Criminal Court, 2187 UNTS 3, Article 8(2)(e)(vii).

⁷³ Letter From the President of the Security Council to the Secretary-General, 22 December 2000, UN Doc. S/2000/1234, p.2.

⁷⁴ *Study*, p.596.

⁷⁵ *Study*, pp.xliv-xlv., quoting Philippe Kirsch, ‘Foreword’ in Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: CUP, 2003) p.xiii.

are not necessarily as broad as custom allows in Article 10 of the Statute. Article 10 reads '[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'. The precise nature of Article 10 is a matter of considerable debate,⁷⁶ nonetheless it is, if nothing else a warning that the Rome Statute is not to be taken as anything more than a base-level of what customary law is.⁷⁷ Yet the commentary makes no reference to Article 10 of the Rome Statute.

Perhaps the best general comment about the normative value of the Rome Statute came from the Trial Chamber in the *Furundžija* case, which stated:

In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions, resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.⁷⁸

As we will see, however, some of the most controversial parts of the substantive law contained in the Rome Statute appear to be adopted by the *Study*, which thus contains some formulations which are more limited than custom.

The final thing to note about the treatment of the Rome Statute is the Elements of Crimes adopted under Article 9 of the Rome Statute.⁷⁹ Article 9 reads: 'Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8'. The intention of the drafters of the Statute was not that these elements were to bind the Court, but to act in a persuasive fashion to guide the court.⁸⁰ The Study uses the Elements on a number of occasions, but at no time does the study explain the weight which is to be attached to the Elements. Again we see that the study is wanting when it comes to explaining the precise normative status of the documents it relies on.

Moving on to judicial decisions, the *Study* is quite explicit that it has sympathy for the decisions of the international criminal tribunals, saying that:

⁷⁶ See, e.g. Leila Nadya Sadat, 'Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute' (2000) 49 *De Paul Law Review* 909; *contra*, e.g. Kenneth S. Gallant, 'Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts' (2003) 48 *Villanova Law Review* 763.

⁷⁷ See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP, 2005) Chapters 5-6.

⁷⁸ *Prosecutor v Furundžija*, Judgment, IT-95-17/1-T, 10 December 1998, para 227. *Prosecutor v Tadić*, Judgment, 15 July 1999, IT-94-1-A, para 223, but see Separate Opinion of Judge Shahabuddeen, para 3.

⁷⁹ ICC/ASP/1/3.

⁸⁰ See, Erkin Gadirov, 'Article 9' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999) 289.

Although decisions of international courts are subsidiary sources of international law, they do not constitute State practice. This is because, unlike national courts, international courts are not State organs. Their decisions have, nevertheless, been included because a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect. In addition, because of the precedential value of their decisions international courts can also contribute to the emergence of a rule of customary international law by influencing the subsequent practice of States and international organisations.⁸¹

What is interesting, and perhaps concerning, about this is its omnibus nature, the jurisprudence of international tribunals is apparently considered, *per se*, 'persuasive evidence' of a customary rule without any reference to the quality of decisions by those Tribunals.⁸² It is no secret that the quality of decisions between certain international criminal tribunals varies,⁸³ as indeed it does within those tribunals. The persuasive nature of an international decision does, and ought to, depend upon its quality. Given the controversy over customary law, the evidence used for it ought to be high quality, and care must be taken not to take court decisions simply as correct restatements of custom. The *Study* is correct to treat the Nuremberg IMT's decision that the Hague Regulations attached to Hague Convention IV of 1907⁸⁴ were customary as (now) uncontroversial.⁸⁵ It does also note, on the other hand, citing Nuremberg as an example, that '[i]t appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person provided there is no important contrary *opinio juris*.'⁸⁶ This appears to accept that tribunal decisions are not always defensible on traditional grounds. This, however, might be referable to what is implied by the latter part of the quote above, that after a time, many controversial determinations of customary international law by tribunals become normalised.

The influence of decisions on the study, however, is not entirely consistent. Responding to the criticism that the study does not deal with definitions of armed conflict and internationalisation of non-international conflicts,⁸⁷ one of the report's authors wrote to the critics explaining

⁸¹ *Study*, p.xxxiv.

⁸² For other problems with the way in which the *Study* approaches case law, in relation to human rights bodies see Heike Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Study' (2006) 11 *Journal of Conflict and Security Law* ??, ??

⁸³ The Special Court for Sierra Leone, for example, has come under considerable criticism for the quality of the reasoning in some of its decisions, see, e.g. Deen-Racsmany, 'Taylor', *supra* n.18; Sarah Williams, 'Amnesties in International Law; The Experience of the Special Court for Sierra Leone' (2005) 5 *Human Rights Law Review* 271, p.307; Robert Cryer, 'Commentary' in Goran Sluiter and Andre Klip (eds.), *Annotated Leading Cases of the International Criminal Tribunals: Volume IX* (Antwerp: Intersentia, forthcoming 2006).

⁸⁴ 'Nuremberg IMT, Judgment and Sentence' (1947) 41 *American Journal of International Law* 172 p.248

⁸⁵ *Study*, p.xliv. The ICJ, for example, has taken this view without criticism, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep. 172, para 89; *Case Concerning Armed Activities On the Territory of the Congo* ICJ General List 116, para 217.

⁸⁶ *Study*, p.xliii.

⁸⁷ Maclaren and Schwendimann, 'Exercise', *supra* n.12, pp.1226-8.

All that we could have done was to repeat the various provisions in treaty law...and possibly some *dicta* from case law of the ICTY. But we felt that this was not sufficiently exhaustive to make any statement.⁸⁸

This is a surprising statement, given that there is a rich jurisprudence from the ICTY on internationalisation of armed conflicts,⁸⁹ including at appellate level.⁹⁰ The matter cannot be considered to have only been tangentially raised in the ICTY. Even if it is the case that there is a strict *ratio/obiter* distinction in international law,⁹¹ the issue of the applicability of the grave breaches of the Geneva Conventions, i.e. the nature of the armed conflict, was not an *obiter* issue. It was central to the conviction of, for example, Dusko Tadić on counts concerning Grave Breaches of the Geneva Conventions. It might also be noted that at least some of the ICTY's jurisprudence on this matter has had a considerable impact on international law. The definition of non-international armed conflict given in the *Tadić* interlocutory appeal was taken up almost verbatim in the Rome Statute.⁹²

The disavowal of placing reliance on *dicta* from the Tribunals is also inconsistent with the treatment of such statements elsewhere in the *Study*. For example, the *Study* takes a very broad view of the customary law applicable to prohibited weapons in non-international armed conflicts.⁹³ It is likely that their bold approach here was partially underpinned by the statement of the ICTY Appeals Chamber in the *Tadić* interlocutory appeal that

Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars cannot but be inadmissible in civil strife.⁹⁴

The *Study* cites the paragraph (although not making clear how much weight it is expected to bear).⁹⁵ Yet Tadić was not accused of any weapons offences, thus the statement was unquestionably *obiter*. Indeed, so were a considerable proportion of the decision's determinations of what customary law applied in non-international armed conflict, which are also relied on in the *Study*.⁹⁶

These comments on the general approach complete, it is worthwhile investigating some specific areas where the *Study* uses the statutes and practice of the international criminal tribunals. It ought to be noted though that although elements of the *Study* are subject to

⁸⁸ *ibid.*, p.1227.

⁸⁹ On which see Christine Byron, 'Armed Conflicts: International or Non-International?' (2001) 6 *Journal of Conflict and Security Law* 63.

⁹⁰ *Tadić*, *supra* n.53, paras 83-162; *Kordić and Čerkez* Judgment, IT-95/2-A, 17 December 2004, paras 295-378.

⁹¹ A distinction which Lauterpacht, for example, doubted, *Development*, *supra* n.3, p.61. See also Shabtai Rosenne, *The Perplexities of Modern International Law* (The Hague: Martinus Nijhoff, 2004) p.45. Equally, the ICTY considers there to be such concepts, *Prosecutor v Aleksovski*, Judgment, IT-95-14/1-A, 24 March 2000, paras 110, 113.

⁹² See *Prosecutor v Tadić*, *supra* n.2, para 70; Rome Statute, Article 8(2)(e).

⁹³ See David Turns, 'Weapons in the Customary Study' (2006) 11 *Journal of Conflict and Security Law* ??, pp.??

⁹⁴ *Tadić*, *supra* n.2, para 119.

⁹⁵ *Study*, p.240.

⁹⁶ See, e.g. *Study*, pp.7-8, 129, 262.

criticism, the majority of the considerable use made by the study of the tribunals is not problematic. Few, if any could criticise the reference to the Nuremberg IMT Charter, for example, for the proposition that murder is a war crime.⁹⁷ The majority (but not all by any means) of the uses of the Rome Statute are similarly uncontroversial. The examples chosen, however, represent some more general difficulties with the approach in the *Study*.

TAKING THE CASES TOO SERIOUSLY? THE LAW OF REPRISALS

At times the study is perhaps a little over-sanguine in relation to case-law, taking some decisions as having a greater authority than their reasoning merits. Jurisprudence ought not to be adopted uncritically.⁹⁸ As mentioned above, the persuasive value of case-law is directly related to its quality or reasoning. In the, admittedly controversial, case of reprisals, in particular, reprisals targeting the civilian population outside of occupied territory which are prohibited under Article 51(6) of Additional Protocol I, the study relies on a piece of *obiter* in one of the most controversial decisions of the ICTY, *Prosecutor v Kupreškić*.⁹⁹ In relation to rule 146, which entirely accurately states 'Belligerent reprisals against persons protected by the Geneva Conventions are prohibited'¹⁰⁰ the commentary concludes that

Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallised a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of States, some of which is ambiguous. Hence, there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals. The International Criminal Tribunal for the former Yugoslavia, in its review of the *Martić* case in 1996 and in its judgement in the *Kupreškić* case in 2000, found that there was such a prohibition already in existence, based largely in the imperatives of humanity or public conscience. These are important indications, consistent with a substantial body of practice now condemning or outlawing such reprisals.¹⁰¹

It is not the purpose of this section to deny the moral and practical problems, which are fairly well described by the *Study*,¹⁰² which accompany reprisals. However, the reliance on the *Martić* and *Kupreškić* cases, although careful (the study does not assert the cases settled the issue), fails to note that the reasoning in the cases has been subjected, on a legal level, to

⁹⁷ *Study*, p.311.

⁹⁸ Meron characterises the approach of the ICTY as 'conservative' on customary law, (Meron, 'Revival' *supra* n. 11, pp.821-829, but does not refer to a number of the more controversial cases.

⁹⁹ *Prosecutor v Kupreškić et al*, Judgment, IT-95-16-T, 14 January 2000, paras 521-536

¹⁰⁰ Assuming that the reference to the Geneva Conventions is to those of August 1949 rather than Additional Protocol I, as we will see.

¹⁰¹ *Study*, p.523.

¹⁰² *Study* pp.512-3. Although see the apposite comments in Dieter Fleck, 'International Accountability for Violations of the *Jus in Bello*: The Impact of the ICRC Study on Customary International Law' (2006) 11 *Journal of Conflict and Security Law* ??, pp.??

quite devastating critique.¹⁰³ As Christopher Greenwood put it '[t]he Trial Chamber in *Kupreškić*...cited virtually no State practice at all and what it did cite does not support the conclusions it drew'.¹⁰⁴ Frits Kalshoven goes further, and states that the attempt to read practice the way the Trial Chamber did in *Kupreškić*, and use the Martens Clause to paper over the cracks in practice is 'founded on quicksand'.¹⁰⁵ On that basis, he concluded that 'the *Kupreškić* judgment fall[s] in the category of judicial decisions that not merely have no binding force of precedent, but lack persuasive authority'.¹⁰⁶

Against this background, it is difficult to see those cases as contributing a 'trend'. The response of academics to the decision at least partially undermines the case's contribution to it. It might be noted, although owing to the timing of its publication meant that the *Study* could not take it into account, the UK *Manual of Military Law* is clear that the UK has taken the view that the decision in *Kupreškić* is, insofar as it relates to a customary prohibition on reprisals, simply wrong.¹⁰⁷ Failing to refer to the commentaries on the decisions, which directly impugned the reasoning and presaged, if not influenced, State responses, is unfortunate. It is quite possible that the *Study* did in fact take into account these critiques. After all, it is careful not to follow the *Kupreškić* decision slavishly (and that point should be reiterated, as it implies that the *Study* has not, in practice, always taken the general view the introduction suggests). If it did take those academic views into account, however, the *Study* ought to have made this clear. The second volume of *Study* contains a plethora of practice relied upon (and excerpts from cases), to show how the rules were justified. If other considerations, such as academic commentaries, were taken into account, then it is important to state this alongside the practice.¹⁰⁸

¹⁰³ The reasoning in the case is effectively skewered by Christopher J. Greenwood, 'Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' in Horst Fischer, Claus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin, Springer, 2001) 539. See also Frits Kalshoven, 'Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal' in Vohrah *et al* (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (The Hague, Kluwer, 2003) 481.

¹⁰⁴ *Ibid.*, p.550.

¹⁰⁵ Kalshoven, *supra* n.102, p.504.

¹⁰⁶ *Ibid.*, p.508.

¹⁰⁷ *Prosecutor v Kupreškić*, *supra* n.98, paras 521-536. See Ministry of Defence, *Manual of the Law of Armed Conflict* (Oxford: OUP, 2004) p.421.

¹⁰⁸ There are a number of references to academic works in the *Study* when it deals with the particular rules, but the vast majority of the references are simply to factual assertions. There are some references to the ICRC commentaries on the Geneva Conventions and Additional Protocols, see, e.g. *Study*, vol. II, pp.330, 342, 506, 545, 977, 989, 990, 1205, 1338, 1354, 1388, 1414, 1437, 1457, 1551, 1786, 1793, 2060, 2137, 2147 2456 2467, 2487, 2512, 2880, 2895, 3195, 3286, 3299, 3528, 3591, 3883. The most heavily used piece of academic literature, which is used to assist in the determination of custom is a piece by Michael Matheson, Michael J. Matheson, 'The United States Position on the Relation of Customary Law to the 1977 Protocols Additional to the Geneva Conventions of 1949' (1986) 2 *American University Journal of International Law and Politics* 419. The piece is referred to e.g in the *Study* Vol II at pp.73, 187, 318, 351, 472, 526, 572, 664, 698, 709, 721, 834, 835, 895, 926, 988, 1134 (both). 1268, 1326, 1337, 1353, 1387, 1539, 1993, 2006, 2035, 2187, 2204, 2278, 2387, 2408, 2509, 2532, 2544, 2560, 2579, 2587, 2638, 2661, 2686, 2712, 2720, 2730, 2747, 2770, 2831, 3085, 3104, 3204.), 3382, 3392, 3420, 3451, 3469, 3478, 3487, 3498, 3993, 4077. It seems that this was (quite sensibly, given the title, Matheson's position as Deputy Legal Adviser to the US State Department and the absence of any caveat in the piece that he is speaking in a personal capacity), basically taken as a statement of US official views, rather than a judgment on its intrinsic academic merit. In a slightly ironic twist, one of the very few areas where academic commentaries are used in the *Study* is on the general conditions of lawful reprisals (*Study* Vol II, pp. 3328, 3336, 3337, 3346, 3374, 3505-3506) where earlier works by Greenwood (Christopher Greenwood, 'The

TAKING ROME TOO SERIOUSLY-SUPERIOR ORDERS, COLLATERAL DAMAGE AND COMMAND RESPONSIBILITY

The *Study* appears to take the sometimes controversial parts of the Rome Statute at face value, ignoring the drafting history of those provisions, and ignoring academic commentary on those provisions and their customary or otherwise status. Three particular areas spring to mind on this: superior orders, the formulation of the offence of launching an attack with excessive collateral damage and (civilian) superior responsibility.

Superior Orders

To begin with superior orders, the *Study*, in rule 155, provides that ‘Obeying a superior order does not relieve a subordinate of criminal responsibility if they subordinate knew or should have known that the act ordered was unlawful or should have known because the manifestly unlawful nature of the act.’ It might be surprising, therefore that the explanation of the rule in the commentary begins by noting that the rule that superior orders are not a defence ‘was set forth’ in the Charter of the Nuremberg and Tokyo IMTs, and that the principle was not rejected in the drafting of the additional protocols.¹⁰⁹ This is entirely true, however, the Nuremberg and Tokyo IMT Statutes did not contain any requirement that the order be manifestly unlawful. They excluded the defence completely. The statement in the *Study* is followed by the assertion that

the rule that superior orders are not a defence is restated in the Statutes of the International Criminal Court, of the International Criminal tribunals of the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone and in UNTAET regulation No 2000/15 for East Timor. Conditions are spelled out in some detail in the Statute of the International Criminal Court: obedience to an order is not a defence when the person knew the order was unlawful or when the order was manifestly unlawful.¹¹⁰

This mixes two very different sets of provisions. All the documents mentioned, other than the Rome Statute, provide that superior orders are not a defence *per se*, but the commentary gives the impression that they are *ad idem* on superior orders. They almost are. The only treaty mentioned which supports the rule they assert, rather than the rule that superior orders are not a defence at all, is the Rome Statute.

The finding would have been more nuanced had it referred to the considerable academic commentary that supports or casts doubt on the customary nature of Article 33 of the ICC

Twilight of the Law of Belligerent Reprisals’ (1989) 20 *Netherlands Yearbook of International Law* and Kalshoven (Frits Kalshoven, *Belligerent Reprisals* (Leyden: Sitjhoff, 1971) are relied upon quite heavily.

¹⁰⁹ *Study*, p.565

¹¹⁰ *Study*, p.566.

Statute.¹¹¹ Some of that academic commentary also deals with the case law (much of which is cited by the study), and explains it on the basis that it relates to generally applicable domestic laws rather than those specifically applicable to international crimes.¹¹² This is not to say that the rule as formulated in the study is necessarily wrong, the *Study* does cite practice in support of the rule, however, it is fair to say that much of this practice (from both before and after Rome) seems to have been filtered through the lens of Article 33 of the Rome Statute, whilst other practice relating to the tribunals (including the ICTY and SCSL, which were meant to state the customary rules) has been seemingly downgraded to a secondary status. As the *Study* has done this, it needs to explain why the unequivocal rejection of a superior orders defence was acceptable when the ICTY, ICTR and SCSL Statutes were being drafted, but customary law now provides for a wider defence.

Collateral Damage

To move on from defences, it is worth looking at an offence which the *Study* seems to take its formulation, rather uncritically, from the Rome Statute. This is the war crime of excessive collateral damage. The customary rule, at least according to the ICTY (whose decisions on this subject are fairly well reasoned) is that the provisions in Additional Protocol I are customary which, as serious violations of humanitarian law, are criminal.¹¹³ However, the *Study's* commentary to rule 156, expands upon the statement that 'serious violations of international humanitarian law constitute war crimes'¹¹⁴ by averring that there is a war crime related to launching an attack that causes disproportionate damage, which is framed as follows:¹¹⁵

launching an attack in the knowledge that such attack will cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct military advantage expected.'

The *Study* quite rightly notes that this wording is drawn from Article 8(2)(b)(iv) of the Rome Statute. It also candidly points out that the framing of the Rome Statute on this matter

¹¹¹ See Paula Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law' (1999) 10 *European Journal of International Law* 172; Antonio Cassese, *International Criminal Law* (Oxford: OUP, 2003) pp.231-242; Hilaire McCoubrey, 'From Nuremberg to Rome: Restoring the Defence of Superior Orders' (2001) 50 *International and Comparative Law Quarterly* 386; Charles Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?' (1999) 336 *International Review of the Red Cross* 785.

¹¹² See, Gaeta, *ibid.*, p.183.

¹¹³ *Prosecutor v Strugar*, Decision of 22 November 2002, IT-01-42, para 10; *Blaškić* Appeal, paras 157-158; Greenwood, 'Customary', pp.123-125. That the provisions of Additional Protocol I on this matter was common ground between the parties in the Ethiopia/Eritrea Claims Commission, *Partial Award, Western and Eastern Fronts, Ethiopia's Claims 1 & 3*, 19 December 2005, para 18.

¹¹⁴ On the latter point, see below, pp.??

¹¹⁵ *Study*, p.576.

is different to that of Additional Protocol I.¹¹⁶ Article 85(3)(c) of Additional Protocol I prohibits

[launching] an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated

The study does note that the word ‘overall’ as an adjective for concrete and ‘direct military advantage’ is missing from the rule, although it is present in the Rome Statute, but avers that the meaning is the same. This is possibly the case although the position is not absolutely clear,¹¹⁷ and the interpretation of ‘concrete and direct’ is a matter of considerable controversy.¹¹⁸

However, by pointing to one alteration, the *Study* passes over a far more controversial one. This is an addition to the rule over the formulation in AP I. The word ‘clearly’ is added as a qualifier to ‘excessive’. The commentary to the rule does not explain the addition of this term, which only appears in the Rome Statute. The addition of the word was controversial in Rome. It was unprecedented and opposed by a number of States.¹¹⁹ The addition of the term, which has had no effect on ICTY jurisprudence on the definition of the offence in customary international law, also has a negative impact on the rule. The term does not fulfill its ostensible purpose, which was to clarify the crime, but simply raises the threshold and introduces greater uncertainty into the law in this area.¹²⁰

This is interesting, given that here we have a treaty (API), which has been declared by the Appeals Chamber of the ICTY to reflect custom on this point, being passed over in favour of the Rome Statute. Given that jurisprudence is considered persuasive by the *Study*, and the Rome Statute is thought a good reflection of custom, the *Study* needs to explain why one was chosen over another. Again, there is literature in the area that clarifies the customary statute of the Rome Statute accurately.¹²¹ Engagement, or perhaps explicit engagement, with the *travaux* (such that there are), case-law and academic commentary on this provision is important and would perhaps have led to a different rule being formulated. It would at least have blunted Daniel Bethlehem’s critiques that the *Study* deviates from treaty texts without explaining why, and fails to explain the ‘weight’ it puts on practice, which are applicable here.¹²²

¹¹⁶ *Ibid.*, p.577.

¹¹⁷ See, e.g. the formulation in the New Zealand Proposal Concerning Article 5, 2 July 1998, UN Doc A/Conf.183/C.1/LA0, reprinted in *United Nations Conference of Plenipotentiaries for the Establishment of the International Criminal Court: Official Records: Volume III: Reports and Other Documents*, A/Conf.183/13, p.245. The ICRC considered it necessary to say at Rome that in their view the addition of ‘overall’ did not alter the interpretation of the crime, *Study*, pp.49-50.

¹¹⁸ See Dörmann, ‘War Crimes’ *supra* n.108, p.126.

¹¹⁹ See, e.g. New Zealand Proposal, *supra* n.117.

¹²⁰ See Cryer, *Prosecuting International Crimes*, *supra* n.77, pp.277-279.

¹²¹ See, e.g. the concerns reported in Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Ardsey: Transnational, 2002) p.165.

¹²² Bethlehem, *supra* n.65, p.15.

Superior Responsibility

Having appraised one rule about a defence and one rule about an offence, let us turn to a principle of liability, namely command responsibility. Within the rule postulated by the *Study*, which is for the most part uncontroversial, one issue stands out. The traditional view, as (apparently) accepted in the ICTY, ICTR and SCSL statutes,¹²³ is that the mental element for command responsibility is the same, whether the person is a civilian or a military superior.¹²⁴ Rule 153 of the *Study*, on its face, appears to accept the point:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes....

However in the commentary to rule 153 the *Study*, notes, that

for superiors other than military commanders, the Statute of the International Criminal Court uses the language: “consciously disregarded information which clearly indicated....This standard was used by the International Criminal Tribunal for Rwanda in the *Kayishema and Ruzindana* case in 1999 to delineate the meaning of “had reason to know” for non-military commanders.¹²⁵

The first problem with the *Study* on this point is that it does not explain the relationship between this statement and Rule 153. By stating the fact, but not further commenting on it, the implication is that the *Study* is supportive of the Rome Statute/*Kayishema and Ruzindana* approach, or at least happy to allow the statements to go uncontroverted. This is problematic. The *Study* ought to have made clear that it was only late in the Rome negotiations that the proposal to separate off civilian superiors from military superiors was made, and the chair of the negotiations was clearly uncomfortable about the customary status of the distinction.¹²⁶

The *Study*'s reference to the use of the Rome standard in 1999 for civilian command responsibility to interpret ‘had reason to know’ by the ICTR in *Kayishema and Ruzindana*¹²⁷ also needs both contextualization and further comment. The first tribunal to deal with

¹²³ The latter of which, it might be noted does not adopt the Rome Statute’s express distinction between civilians and military superiors, despite coming after it.

¹²⁴ There is a relevant distinction to be made between them but it is not at the level of *mens rea*, but at the point of determining if the relevant relationship falls under the test of the person exercising effective control and failing to exercise that control.

¹²⁵ *Study*, p.562.

¹²⁶ Per Saland ‘International Criminal Law Principles’ in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer, 1999) 189 p.204.

¹²⁷ *Prosecutor v Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, 21 May 1999, paras 227-228.

civilian command responsibility, the Tokyo IMT, made no distinction between the standards applied to military and civilian leaders in its judgment.¹²⁸

In the *Čelebići* Trial Chamber decision it was decided that that once the qualifications to become subject to the standard (i.e. effective control) are complete, then the *mens rea* standard is the same whether a person is a civilian or a servicemember.¹²⁹ Later cases, such as the *Čelebići* Appeal Judgment, have sometimes been bashful about the relationship between customary law and the formulation of command responsibility in the Rome Statute.¹³⁰ But the simple fact that these decisions post-date the Rome Statute, and the fact that the extent to which the Rome Statute was reflective of custom in this area was controversial in relation to an issue which was far less debated at Rome,¹³¹ at least ought to have merited some reference in the commentary. As should the academic writings that show that the standard in Rome was retrogressive with respect to customary law.¹³² Whether the *Study's* authors agree with these commentaries or not, the commentary as it stands may be faulted is both ambiguous in its relationship with the Rule and either selective or incomplete in relation to its appraisal of practice, case-law and doctrine.

READING THE SMALL PRINT: THE RULES AND THE COMMENTARIES

This leads to a final, more general critique that may be made of the *Study*. The rules themselves cannot be seen as self-contained. Like ILC rules such as those on State Responsibility; the rules in the *Study* have to be read with their commentary. And this is not in itself a problem, but as was noted above in relation to command responsibility what the rule gives, the commentary sometimes takes away.¹³³ This is compounded by the fact that the *Study* does not always makes clear in the commentary where it is simply reporting practice for comprehensiveness rather than for its authority, and where it is intended to interpret, or qualify the language in the rule. To take, as another example, Rule 156 on war crimes. The rule itself reads ‘Serious violations of international humanitarian law constitute

¹²⁸ ‘Judgment’, reprinted in B.V.A. Röling and C.F. Rüter, (eds.), *The Tokyo Judgment* (Amsterdam: Amsterdam UP, 1977) pp.29-31. Although this was not uncontroversial, the dissenter who dealt with command responsibility, Judge Röling, did not distinguish civilians and military personnel in relation to the conditions for liability in this regard Dissenting Opinion of Judge Röling, in Röling and Rüter, (eds.), *Tokyo Judgment*, pp. 1062-1064, Röling’s criticisms of the majority were related to the majority not appropriately dealing with the effective control test for civilians, not the *mens rea*, which. Judge Pal, in essence, did not accept command responsibility for either set of defendants, Dissenting Opinion of Judge Pal, *ibid.*, p.966.

¹²⁹ *Prosecutor v Delalić, Delić, Mucić and Landžo*, Judgment, IT-96-21-T, 16 November 1998, paras 379-393. See also *Prosecutor v Krnojelac*, Judgment, IT-97-25-T, 15 March 2002, para 94.

¹³⁰ *Prosecutor v Delalić, Mucić, Delić & Landžo*, Judgment, IT-96-21-A, 20 February 2001, para 240.

¹³¹ *Prosecutor v Hadžić, Hasanović, Alagic and Kubura* Decision on Interlocutory Appeal in Relation to Command Responsibility, IT-01-47-AR72, 16 July 2003.

¹³² See Greg Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)’ (2000) 25 *Yale Journal of International Law* 89, pp.123-124 and Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague, T.M.C. Asser Press, 2003) pp.191-192. Although see Zhu Wenqi ‘The Doctrine of Command Responsibility as Applied to Civilian Leaders: The ICTR and the *Kayishema* Case’ in Sienho Yee and Wang Tiejia (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopai* (London, Routledge, 2001) 373.

¹³³ See also Kreiger, ‘Conflict of Norms’. *supra* n. 82, pp.??

war crimes', which seems both clear and simple, and to take the correct position on the question of whether or not a separate rule criminalising the violation (serious or not) is required.¹³⁴ However, in the commentary to the rule, the *Study* refers to consistent ICTY and ICTR jurisprudence, traceable basically to the *Tadić* appeal decision, to the effect that there must be a separate rule criminalising the violation for such a violation to amount to a war crime.¹³⁵ Leaving aside the fact, as the *Study* quite rightly notes, that earlier practice was not to this effect,¹³⁶ the study seems to have sympathy for the *Tadić* approach, by stating that *Tadić* et al do 'not exclude the possibility that a State may define under its national law other violations of international humanitarian law as war crimes. The consequences of so doing, however, remain internal and there is no internationalisation of the obligation to repress those crimes and no universal jurisdiction'.¹³⁷ However, if this is the case, the commentary has undermined the rule. Here we can see an over-reliance on ICTY jurisprudence without sufficient evaluation of the quality of the decisions being relied upon,¹³⁸ but this time with the superaddition of greater uncertainty as even to what the rule asserted to be customary is.

CONCLUSION

The foregoing is critical of the *Study*. Nonetheless, it is important to note that the critique is of aspects of how the *Study*, in limited cases, has relied (or not relied) on documents and cases without always taking into account their background or quality. A majority of its conclusions can be supported wholeheartedly. The critiques above are emphatically not that the *Study* consistently overstates custom, or even that it has a tendency to. Indeed, the majority of the above is implicitly based on the feeling that in relation to at least a small number of issues, it could have gone a little further without going beyond existing law.

The work of a critic is an easy one, especially when compared to that of an author. As a work of scholarship, the *Study* is a stunning piece of work. Against the background of the difficulty of establishing custom at all, the *Study* has gone a huge way towards setting out the position under custom, and by even setting down the rules, has provided both impetus for further study in the area and a basis for debate.¹³⁹ The simple fact that within the confines of

¹³⁴ On which see Peter Rowe, 'War Crimes' in McGoldrick, Rowe and (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004) 203, pp.204-205; *contra*, Georges Abi-Saab, 'The Concept of War Crimes' in Sienho Yee and Wang Tieya, *International Law in the Post-Cold World: Essays in Honour of Haopei Li*, (London, Routledge, 2001) 99, pp.112-113.

¹³⁵ *Study*, p.571. To which might be added *Prosecutor v Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction, (Child Recruitment), SCSL-2004-14-AR72, 31 May 2004.

¹³⁶ *Study*, p.571.

¹³⁷ *Ibid.*

¹³⁸ For critique of the ICTY here see Robert Cryer, 'Prosecutor v Galić and the War Crime of Terror Bombing' (2004) 2 *Israel Defence Forces Law Review* ??, pp.?? For critique of the SCSL, see Matthew Happold, 'International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision in *Prosecutor v. Samuel Hinga Norman*' (2005) 18 *Leiden Journal of International Law* 283.

¹³⁹ Although, as Philip Allotts point out, such debates risk forgetting that regulating war through law is an *ersatz* response to the devastation that war inevitably begets, Philip Allott, 'Law and War: A Sinister Partnership' (2005) 99 *Proceedings of the American Society of International Law* 203.

one piece, or even a symposium, it is impossible to do more than begin to discuss the issues raised by the *Study*, its approach and conclusions is testament to its extraordinary breadth, depth and vision.